

**A CASE ANALYSIS OF *SCAFOM INTERNATIONAL BV V*
LORRAINE TUBES S.A.S : THE APPLICATION OF
ARTICLE 79 OF THE UNITED NATIONS CONVENTION ON
INTERNATIONAL SALE OF GOODS**

T_{IAN} D_{AI}*

This paper discusses the contentious application of article 79 of the United Nations Convention on the International Sales of Goods (CISG) in the Belgian Court of Cassation case of Scafom International BV v Lorraine Tubes S.A.S. The case tackles the result of an unexpected steel price fluctuation which severely interrupted the contractual equilibrium. The Supreme Court determined that the facts at hand amounted to hardship under article 79(1) of the CISG and referred to the UNIDROIT Principles of International Commercial Contracts to allow renegotiation of the price. This decision created an unprecedented interpretation of hardship within the CISG to mark the departure from insistent attitudes of pacta sunt servanda. The decision of the Supreme Court has been heavily criticised for importing domestic principles of hardship by extracting a gap in the CISG and implementing civil law remedies. This discussion combines the historical background of article 79 with real world insights into the steel market trade to challenge the legal reasoning of the court. The case also confirms the persistent difficulties arising from conflicting interpretations of the CISG between civil and common law countries operating within the same international legal framework.

I INTRODUCTION

The highly controversial Belgian Court of Cassation decision in *Scafom International BV v Lorraine Tubes S.A.S*¹ has created a scholarly divide regarding the interpretation, application and purpose of article 79 of the Convention on the Sales of Goods Act (CISG).² This paper will attempt to analyse the core issues of the judicial decision by the Belgian Court with reference to the extraction of hardship from article 79. The content of Article 79 governs exemptions from liability. The definition of hardship may vary according to domestic interpretations. For the purposes of this paper, hardship will be defined using Article 6.2.2 of the 2004 UNIDROIT principles as ‘the fundamental alteration of the contract equilibrium.’³ As hardship is not specifically contained in article 79, this paper will analyse the drafting history of the CISG, the criteria of article 79, and the

* Tian Shou Dai, Master of International Commercial Law Student (The University of Western Australia). Responsibility for the text lies with this author and all errors are hers alone.

¹ Belgium 19 June 2009 Court of Cassation [Supreme Court] (*Scafom International BV v Lorraine Tubes S.A.S.*) available at <<http://cisgw3.law.pace.edu/cases/090619b1.html>>.

² Art 79, United Nations Convention on Contracts for the International Sale of Goods, (Apr. 11, 1980), 1489 U.N.T.S. 3, 19 I.L.M. 671 hereinafter cited as the ‘CISG’.

³ International Institute for the Unification of Private Law (UNIDROIT) Principles 2004.

gap-filling properties of the UNIDROIT Principles to determine whether the judgment of the Belgian court deviates from the standard character of the CISG and unconsciously refers to domestic principles of hardship remedies. The purpose of this paper is to consider the departure of legal reasoning in the court's decision with regard to the intention of the court in pursuing balance between the parties.

II FACTUAL BACKGROUND

The parties, Scafom International BV (the buyer) and Lorraine Tubes S.A.S. (the seller), had concluded an agreement for the sale of steel tubes. After the conclusion of the contract, the cost of steel unexpectedly increased by 70% in 2004. As a result of the increase, the seller wanted to negotiate a higher contract price with the buyer due to the increase in costs. The buyer refused to negotiate and insisted delivery based on the original price. The initial court held that the facts were not considered an 'impediment' and article 79 did not apply. This decision was appealed by the seller. The Appellate Court held that the CISG did not govern the facts of the case and applied French law to overturn the initial judgment. The principle of good faith, as contained in article 1134 of the French Civil Code⁴, was applied to give the parties the right to renegotiate the contract. The case was appealed again by the buyer to the Supreme Court (Belgium Court of Cassation).

On appeal, the Supreme Court held that the CISG specifically governs the facts of the case under article 79. The court implicitly included hardship in the CISG as the facts were determined to constitute an impediment under article 79. However, the CISG does not present a resolution to hardship as article 79 only excludes parties from claiming damages as a remedy. The court interpreted this exclusion as a 'gap' in the contract, which was to be filled by reference to article 7(2) of the CISG. In a controversial judgment, the court decided to fill the gap with the UNIDROIT Principles for International Commercial Contracts and allow the parties to renegotiate the contract price.⁵

⁴ Civil Code (France) art 1134 [Georges Rouhette & Anne R Berton trans, *The French Civil Code* (2004)].

⁵ Belgium 19 June 2009 Court of Cassation [Supreme Court] (*Scafom International BV v Lorraine Tubes S.A.S.*) available at <<http://cisgw3.law.pace.edu/cases/090619b1.html>>.

III HARDSHIP

This paper will first examine the context of economic hardship within the CISG by reference to the drafting history and the criteria of article 79. The drafters of the convention excluded culturally associated terms⁶ in order to establish a compromise between different legal systems of liability exclusion. Article 79 was designed to establish a balance between the Anglo-American model of guaranteed contract performance and the principle of fault within European legal systems. Therefore, the provision reflects an international character conferred on it in an attempt to avoid recourse through domestic law interpretation.⁷

A Drafting History and Purpose

By referring to the remedies of the UNIDROIT Principles, the Court of Cassation became the first court to signify the existence of hardship through market fluctuations in the CISG.⁸ This decision is not regarded lightly in the academic community. Scholars who reject the existence of hardship specifically reference the drafting history of the provision as evidence against the court decision.⁹ Initially, article 79 was drafted to narrow the conditions of liability exclusion that arose from criticism surrounding article 74 of the 1964 Uniform Law on International Sales. The 1964 provision was defined as ‘too readily’ excusing parties from performing the contract.¹⁰ Thus, a narrower interpretation was founded in the drafting of article 79 of the CISG. Furthermore, subsequent proposals to broaden the scope of article 79 were ultimately rejected. Originally, an express hardship provision was proposed to allow parties to claim avoidance or adjustment of a contract when facing unexpected ‘excessive damages’.¹¹ Without detailed explanation, the committee decided to reject this proposal. Subsequently, a Norwegian proposal to broaden the application of article 79 was considered, in order to allow a temporary

⁶ Bruno Zeller, ‘Article 79 Revisited’ (2010) 14 *Vindobona Journal of International Commercial Law and Arbitration* 151,153.

⁷ Stoll & Gruber (cited in Zeller 153).

⁸ Amalina Tajudin, ‘Scafom International BV v Lorraine tubes S.A.S: A Case Review of Changing Circumstances under the United Nations Convention on International Sale of Goods (CISG) of 1980’ (2014) 4(2) *Juridical Tribune* 211, 215.

⁹ Harry Flechtner, ‘The Exemption Provision of the Sales Convention, Including Comments on “Hardship” Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court’ (2011) 3 *Belgrade Law Review* 84, 98.

¹⁰ Alejandro M Garro, ‘Comparison between Provision of the CISG Regarding Exemption of Liability for Damages (art 79) and the Counterpart Provision of the UNIDROIT Principles (Art 7.1.7)’ (2005) IV9 available at <<http://cisgw3.law.pace.edu/cisg/principles/uni79.html>>.

¹¹ *Ibid* IV10.

exemption from performing the contract to become permanent under unreasonable circumstances. However, French delegates raised concerns that this provision follows too closely with some domestic doctrines.¹² As a result, the drafting history of article 79 may suggest an express rejection of ‘hardship.’

However, the drafters did not provide conclusive reasoning for the rejection of the hardship provision in the CISG. Bund argues that it is likely that the drafters could not decide upon the appropriate language for the hardship provision without necessarily disregarding the inclusion of hardship in the CISG.¹³ In relation to the Norwegian proposal, the drafters were clearly focused on excluding terminology which resembled domestic principles. Whilst there is no specific conclusive evidence of hardship rejection within the drafting history,¹⁴ one cannot determine that there is the inclusion of hardship either.

The CISG Advisory Council Opinion No. 7 concludes that hardship is found within article 79(1) as an event that renders performance ‘excessively onerous’.¹⁵ As such, ‘impediment’ is determined to be less strict than impossible to perform. The opinion provides that a party which finds itself in a situation of hardship may invoke hardship as an exemption from liability under article 79.¹⁶ This statement further supports the decision of the court if ‘in a situation of hardship under article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based.’¹⁷

Furthermore, Professor Garro specifically prefers hardship to be contained within article 79 of the CISG in order to promote uniformity:

If it is accepted that a situation of unexpected and radically changed circumstances, in truly exceptional cases, deserves some legal response, then we are inclined to favour a broad interpretation of CISG article 79 that would pre-empt the application of a domestic rule on hardship.¹⁸

¹² Ibid IV11.

¹³ Jennifer Bund, ‘Force Majeure Clauses; Drafting Advice for the CISG Practitioner’ (1998) 17 *Journal of Law and Commerce* 381, 393.

¹⁴ Ibid.

¹⁵ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People’s Republic of China, on 12 October 2008, opinion 3.1 available at <<http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>>

¹⁶ Ibid.

¹⁷ Ibid opinion 3.2.

¹⁸ Above n 10, IV13.

If it appears unreasonable for hardship to be ignored, Professor Garro encourages courts to apply international sales law and stay within the four corners of the CISG.¹⁹ The argument is based on the fear that without recourse to the CISG, courts will apply domestic laws of hardship which may prevent uniformity of application. Therefore, in order to unify the law, article 79 should be interpreted to include hardship within the confines of the CISG.²⁰

Nagy believes the proposal to include hardship in the CISG could lead to an excessively broad scope of exception resulting from conflicting interpretations of hardship and inconsistent decisions.²¹ In light of the liability exception provision, the specificity of requirements completely contradicts the broad interpretation described within Opinion No. 7. In cases of unexpected and unforeseeable events, perhaps legal response should be governed by the use of international law instead of domestic law. However, what is preferable might not be realistic. The CISG rejects a fault-based approach to damages and focuses instead on strict liability. This principle is partly limited by the exception in article 79.²² However, the *pacta sunt servanda* principle requires performance of obligations to reflect a strict liability approach.²³ Based on the general conditions of the CISG, broadening the interpretation of article 79 may undermine the no-fault principles of the CISG.²⁴ Article 79's intention to narrow the scope of exclusion cannot be expanded in the event where one finds preferable. To base the broader interpretation of exception on convenience ignores the overall intention of article 79 and the exceptional standards in applying this provision. In reference to promoting uniformity, Professor Garro neglects to describe the unconscious effect of domestic legal backgrounds in court decisions. If hardship is contained within the CISG, court reasoning may be contained within the four corners of article 79, but the actual decisions passed down may not be uniform if domestic hardship laws of the court guide them. *Scafom International BV* is an obvious example of this non-uniform application based on homeward trends.²⁵ This aspect of the

¹⁹ Ibid IV 6

²⁰ Ibid.

²¹ Brandon Nagy, 'Unreliable Excuses: How do Differing Persuasive Interpretations of CISG Article 79 Affect its goal of Harmony?' (2013) 26(2) *New York International Law Review* 20.

²² Harry Flechtner, 'Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods' (2007) 19(1) *Pace International Law Review* 29, 33.

²³ Carolina Arroyo, 'Change of Circumstances under the CISG (Master thesis, Bucerius Law School, 2012) 1.

²⁴ Above n 22, 34.

²⁵ Above n 9, 99.

case will be discussed in later sections of the paper.

B *Criteria*

The criteria for liability exemptions under article 79 are extensive.²⁶ This may explain the absence of application in prior cases.²⁷ Depending on the interpretation of the article, the standards following ‘impediment’ centre on three key factors. The first criterion requires the impediment be beyond the control of the party. The second necessitates that the party could not have reasonably accounted for the impediment; and thirdly, the parties could not have reasonably expected to overcome it or its consequences.²⁸ There is unanimous agreement that the criterion of article 79 is strict. However, there are conflicting opinions regarding the boundaries of ‘impediment’ and whether hardship fits within ‘impediment’.²⁹

Under the UNIDROIT Principles, hardship is defined to provide relief even if the party’s performance remains possible. This is when post-contract developments fundamentally affect the equilibrium of the contract. In particular, economic problems constitutes as hardship if the cost of performance has increased under article 6.2.2 of the UNIDROIT Principles.³⁰ The relief expected from hardship is the requirement that the parties renegotiate the terms of the contract to restore the original contractual equilibrium. If this fails, the court may adapt or terminate the contract without the explicit consent of the parties.³¹ Referring back to *Scafom International BV*, the Supreme Court have applied the relief methods provided in the UNIDROIT Principles, as article 79 does not allow for renegotiation of the contract.

The criteria of hardship defined in article 6.2.2 partly reflects the criteria set out in the CISG with reference to article 6.2.2(b) ‘the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract’ and (c) ‘the events are beyond the control of the disadvantaged party.’³²

In *Scafom International BV*, the impediment could not be in control of the disadvan-

²⁶ Ibid 86.

²⁷ Above n 21, 6.

²⁸ Above n 6, 153.

²⁹ Above n 21, 27.

³⁰ Art 6.2.2 UNIDROIT Principles 2004.

³¹ Art 6.2.3 UNIDROIT Principles 2004.

³² Art 6.2.2 UNIDROIT Principles 2004.

tagged party as steel prices fluctuate according to market changes in the economy. In addition, the direct effect on steel tubing costs cannot be avoided once the price of raw steel increases. For the sake of discussion, these standards of article 79 will not be debated in terms of the facts of the case.

The more controversial criteria lie with the requirement that a party claiming the exemption could not have reasonably expected the impediment and could not have mitigated the consequences of the impediment. The narrow interpretation may suggest that all areas of risk are foreseeable, but this eliminates the effect of article 79. If parties were to foresee all risks, then any impediment would not constitute the application of article 79. Therefore, a limit of foreseeability may exist for steel traders as well as the standard of risk aversion procedures that parties should perform.

C *Market Fluctuations*

Traders must be aware that risks always exist within the sphere of international transactions, which includes, but is not limited to, market fluctuations. A common theme surrounding article 79 is that market fluctuations are specifically excluded as an impediment because these risks occur in any normal international sale.³³ Therefore, market fluctuations may fall within the scope of hardship instead of impediment, which may automatically exclude this factor from the CISG. In particular, those trading within the commodity market must recognise the potential for a greater possibility of price fluctuation.

Previously, market fluctuations and the application of article 79 in cases of exemption were non-existent.³⁴ For example, the Arbitration Case 11/1996 under the Arbitration Tribunal of Bulgarian Chamber of Commerce and Industry (Steel Rope Case) specifically excluded market fluctuations as an impediment under article 79. The judgment provided that,

the buyer's reasons for asking to stop the delivery did not meet the requirements of Art. 79 CISG on exemption from liability for failure to perform. The buyer had alleged a negative development in the market situation, problems with the storage of the goods, revaluation of the currency of pay-

³³ Above n 15, Comment 39.

³⁴ Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contract' (2008) 39 *Victoria U. Wellington Law Review* 709, 716.

ment and a decrease of trade volume in the construction industry. Such events were to be considered part of the buyer's commercial risk and were thus not impediments amounting to exemption (force majeure). On the contrary, they could have been reasonably expected by the buyer upon conclusion of the contract.³⁵

The court found that market fluctuations for steel products were foreseeable, and the negative market development did not sufficiently qualify as an impediment under the CISG.³⁶ *Scafom International BV* was the first case which categorised market fluctuations as an impediment under article 79.³⁷

1 *A Broader Interpretation of Market Fluctuations?*

In regards to the criteria of article 79, could all market fluctuations be categorised as foreseeable and thus, excluded as an impediment? Although there is certainly an expectation of traders to recognise the risks of trade, the more realistic scope of foreseeability may require limitation even in regards to market fluctuations. This will require analysing the severity of the fluctuation in regards to foreseeability and determine a limit to the percentage change in price. Broadening the approach further may include setting a standard of foreseeability in relation to the causation of the fluctuation with regard to the degree of severity and timeliness. To provide a hypothetical example, a highly unlikely and unforeseeable event may constitute the sudden closure of all mining projects resulting in highly inflated commodity prices. Under the broader approach, this improbable situation may satisfy the criteria of article 79. However, applying the broader criteria to the facts of *Scafom International BV* may prove more difficult. For clarification on the criteria of article 79, it is useful to briefly evaluate the foreseeability of the steel price changes before and during the events of *Scafom International BV*. From 1996-2012, the change of monthly steel wire-rod prices were usually below the 10% mark.³⁸ However, between March 2004 and April 2004, the striking exception of an 83.3% increase indicated a highly irregular rate of growth.³⁹ According to the statistics of steel wire-rod prices, the second highest increase was 22% which is less than four times the amount of the increase experienced between March 2004 and April 2004. With reference to the sta-

³⁵ Bulgaria 12 February 1998 Arbitration Case 11/1996 (Steel ropes case) available at <<http://www.unilex.info/case.cfm?id=420>>.

³⁶ Ibid.

³⁷ Above n 8, 215.

³⁸ Index Mundi, Steel Wire Rod Monthly Price, <<http://www.indexmundi.com/commodities/?commodity=steel-wire-rod&months=240>>.

³⁹ Ibid.

tistics of growth trends, estimation would reveal that the severity of increase was completely unexpected and unforeseeable.⁴⁰ Although not necessarily the same type of steel as in *Scafom International BV*, the rise of all steel prices will vaguely coincide with each other. Therefore, there must be a direct link between the 83.3% increase experienced in 2004 and the 70% increase experienced when the seller was forced to recalculate its price in the same year.

Scholars themselves debate the severity of price change in international markets. In particular, most decisions dealing with hardship under article 79 have rejected the notion that a price increase or decrease of 100% would constitute an impediment under article 79.⁴¹ In addition, international markets are confronted with higher standards as the parties naturally associate more risk in international transactions.⁴² As a result of this additional risk, market fluctuations must be set at a higher point. For example, Schwenger suggests implementing a standard rate between 150% and 200%.⁴³ However, the reality of a price increase of 150-200% appears very unlikely given the history of steel price trends. This statement is supported by the transformation of the steel industry in 2004 resulting from a price increase which did not yet meet the 100% mark.⁴⁴ Therefore, the court in *Scafom International BV* may have interpreted that the severity of the price increase could not have been foreseeable by the parties to satisfy the criteria of article 79. Clearly, this approach broadens the definition of ‘impediment’ if market fluctuations may be governed by article 79 of the CISG.

However, analysis of the fluctuation reveals the correlation between the growth of Chinese demand and the increase in steel prices.⁴⁵ Steel traders should be aware of foreign consumer demands and attempt to mitigate the effects of the rising price before the sudden surge. In order to avoid the consequences of the impediment, a reasonable person may request the inclusion of a price renegotiation clause. Due to the reasonable expectations of continued Chinese growth, a renegotiation contract may be expected in all cases of steel transaction. Despite a sudden surge of prices, historical fluctuation of steel prices should have warned traders to protect against these effects. In addition, the

⁴⁰ Ibid.

⁴¹ Above n 34, 716.

⁴² Ibid.

⁴³ Ibid 717.

⁴⁴ Adam Robert, ‘Reasons for Steel Price Increases and Impact on the Agricultural Machinery Industry’ (2006) 18 *Agricultural Engineering International* 1.

⁴⁵ Ibid 2.

inclusion of a renegotiation clause is less time-consuming and costly than the financial burden of litigation or the uneconomic obligations of the seller party if the prices rise. In a contract for the purchase of steel, traders should have an extensive knowledge of the steel industry. Thus, it is more plausible for the contracting parties themselves to determine what clauses must be included and be held to their original contracts. Both parties will benefit by including a hardship clause in their contracts to mitigate the potential for costly litigation and risk of price fluctuations.⁴⁶ In light of the sudden and drastic change in price, the preceding fluctuations in steel prices and emerging growth of China indicates that in this case, it may be negligent to exclude a renegotiation clause. As Zeller restates, ‘the meaning of art 79 CISG cannot be that it lends a helping hand to a party that because of its own negligence did not provide for this situation in its contract.’⁴⁷ However, this case may require additional expertise to fully comprehend the degree of severity and the accurate foreseeability of the price increase as many of the steel forecasts severely under-estimated the 2004 price change.⁴⁸

The practical effects of a renegotiation clause would technically remedy the situation. However, one might question the purpose of article 79 if cases were not governed by additional clauses or by the CISG provision. Excluding market hardship in the CISG would mean that with the clause, article 79 would become redundant and without the clause; the buyers should have reasonably expected to include a clause so article 79 would still not be applied. This approach would mean that parties could not rely on article 79 for liability exception if they exclude a price renegotiation clause to counter the risk of price fluctuations. Given the economic history of steel price rates, the sudden increase may not have been foreseeable. However, in consideration of the external growth in steel demand from foreign markets and the assumption of trader experience, the determination of market-based exceptions is not backed with credibility and cannot be justified in the manner that was reasoned in *Scafom International BV*.

IV A GAP WITHIN ARTICLE 79?

The next section will examine the suggested ‘gap’ within article 79 of the CISG. In the context of *Scafom International BV*, the gap reflected the absence of a hardship reme-

⁴⁶ Catherine Kessedjian, ‘Competing Approaches to Force Majeure and Hardship’ (2005) 25 *International Review of Law and Economics* 415,419.

⁴⁷ Above n 6, 158.

⁴⁸ Above n 44, 4.

dy.⁴⁹ In this case, renegotiation of price was non-existent in the CISG. The court based their reasoning on article 7(2) of the CISG to remedy matters which are not settled in the CISG with the general principles or rules of private international law.⁵⁰ According to Zeller, article 79 does not present a gap as the conditions of hardship are not incorporated within the provision.⁵¹ Fletcher elaborates further by suggesting that international sales law cannot succeed its purpose of achieving uniformity if the court applies domestic law under the guise of a gap-filler. Courts cannot extract a gap to the convenience of the judgment if a particular remedy is not specified in the CISG. The UNIDROIT Principles are not a duplication of the standards in the article 79 of the CISG. Court judgements relying on these Principles may result in inconsistent decisions based on domestic approaches.⁵²

A The UNIDROIT Principles

A major controversy surrounding *Scafom International BV* is the court reference to the UNIDROIT Principles in order to fill a determined gap in the CISG.⁵³ The purpose of the UNIDROIT Principles is debated in regards to their gap-filling properties. Bund suggests that a court may refer to the UNIDROIT Principles when the CISG does not resolve the issue as this is deemed preferable than resorting to domestic law.⁵⁴ The UNIDROIT Principles can serve a gap-filling purpose to answer unresolved questions that fall within the scope of the CISG.⁵⁵ As such, the hardship provision may be incorporated through the UNIDROIT Principles as the CISG does not address hardship remedies. The UNIDROIT Principles are thought to provide a uniform solution to the gap due to its international character as opposed to incorporating domestic hardship laws. However, the UNIDROIT Principles are derived from sources of law around the world and remain external to the CISG. The CISG was drafted as an internationally recognised source of sales law, unlike the UNIDROIT Principles, which draw from international contract law.⁵⁶ In addition, economic hardship is not contained within the CISG, and thus the

⁴⁹ Above n 9, 97.

⁵⁰ Belgium 19 June 2009 Court of Cassation [Supreme Court] (*Scafom International BV v Lorraine Tubes S.A.S.*) available at <<http://cisgw3.law.pace.edu/cases/090619b1.html>>.

Art 7(2) CISG

⁵¹ Above n 6, 160.

⁵² Above n 9, 100.

⁵³ Above n 8, 215-217.

⁵⁴ Above n 13, 392.

⁵⁵ Ibid 392.

⁵⁶ Above n 9, 95-96.

hardship provision within the UNIDROIT Principles is not aligned with the concepts contained in the CISG.⁵⁷ It is generally recognised that the UNIDROIT Principle can be used to interpret common principles of the CISG, but because hardship is not contained within article 79, the UNIDROIT Principles cannot be used to interpret this provision.⁵⁸ Therefore, without the common general principle of hardship, referring to the UNIDROIT Principles would be tantamount to importing domestic laws.⁵⁹

For the purpose of this discussion, if hardship were to be contained in article 79, would recourse to the UNIDROIT Principles be suitable in the *Scafom International BV*? This argument is diminished as the specific provision within the UNIDROIT Principles was drafted to reflect the civil law hardship doctrine and allow renegotiation or adjustment of a contract.⁶⁰ Therefore, although the UNIDROIT Principles are generally international in nature, their specific provisions are gathered from domestic principles. Referencing the UNIDROIT provisions of hardship is the equivalent of referencing their own domestic civil laws which ignores the purpose of article 79 to provide a balance between the civil and common law traditions. Civil law approaches should not be imposed on non-civil law jurisdictions in an international context.⁶¹ In this case, regard for uniformity and article 7(1)'s promotion of the CISG's international character may be diminished by the homeward trend approach of courts.⁶²

B *A Tendency to Read Article 79 through the Lens of Domestic Law*

Professor Honnold has stated that 'Article 79 may be the least successful part of the half-century work towards international uniformity.'⁶³ Previous courts and tribunals have not provided adequate guidelines as to when the requirements of article 79 have been met. They merely state that the conditions of article 79 have not been satisfied without providing further details.⁶⁴ As such, article 79 might be interpreted and applied with court discretion.⁶⁵ Due to the varied interpretation of article 79, the provision fails

⁵⁷ Above n 46, 419-420.

⁵⁸ Above n 6, 160

⁵⁹ Ibid.

⁶⁰ Above n 9, 97.

⁶¹ Ibid.

⁶² Art 7(1) CISG.

⁶³ Honnold cited in Flechtner, above n 9, 85.

⁶⁴ Above n 15, comment 4.

⁶⁵ Ibid comment 5.

to accurately explain the exact conditions for limited liability and impediment to performance. Without knowledge of the drafting history and preceding cases, the provision can be guided by domestic principles of exceptions. The temptation of a ‘homeward trend’ is argued to be prevalent in the application of article 79.⁶⁶

In contrast to this argument, The Advisory Council Opinion reports that,

The decisions reported to date do not bear out concerns that courts or arbitral tribunals might be too readily excuse a party to perform (...) or that some courts would rely too much on their domestic legal system concepts of force majeure and hardship with resulting diverting interpretations⁶⁷

Although accurate in respects to events prior to 2009, *Scafom International BV* has now highlighted the potential for homeward trends in article 79.

Despite determined efforts to provide a uniform approach through referencing an internationally recognised source of guidance, the educational training and deep-rooted thought patterns of judges can unconsciously affect judicial decisions.⁶⁸ In *Scafom International BV*, the divide between the civil and common law approach can be reflected in the interpretation of article 79. The practice of homeward trends notably contradicts the CISG’s promotion of its international character referenced in article 7(1) of the CISG.⁶⁹

V GOOD FAITH

For the sake of argument, some scholars have touched on the topic of good faith in reference to article 79 and the remedy to renegotiate. The suggestion is based on the duty of good faith to renegotiate.⁷⁰ This duty is considered to be governed under article 7(1) of the CISG. In this instance, there is no reference to article 79 of the CISG as the remedies do not expressly provide for renegotiation. Whether good faith is interpreted as a general principle and whether renegotiation is defined within good faith is debatable. However, the adherence to renegotiation can be based on the overall pursuit for

⁶⁶ Above n 6, 152.

⁶⁷ Above n 15, comment 3.

⁶⁸ Above n 9, 100.

⁶⁹ Art 7(1) CISG.

⁷⁰ Anna Veneziano, ‘UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to the Belgian Supreme Court’ (2010) 15 *Unif. L. Rev* 137, 143.

fairness and intention of the court to remedy the disturbance of the contractual balance.⁷¹ Regard must be given to the court in respect of this line of reasoning. Despite shirking commercial sense in regards to excluding a renegotiation clause, there is reason to argue that the court's intention of balancing equilibrium is not mistaken despite the deviation of legal reasoning in their decision. Arroyo argues that in order to consider fairness and equity, the CISG should be flexible enough to propose a solution to rebalance the contract in consideration of the facts and the underlying principles of the convention.⁷² For example, scholars have concluded that one may infer from the obligation to interpret the CISG in good faith, a duty to renegotiate the terms of the contract with the desire to restore the contractual balance.⁷³ In addition, although the CISG may not govern hardship, both the UNIDROIT Principles and CISG govern good faith. On the basis of a common general principle, reference to article 1.7 of the UNIDROIT Principles on good faith may recognise the existence of a right to renegotiate in the CISG.⁷⁴ Although defining renegotiation as a duty to act in good faith can be criticised, as circumstances of hardship do not indicate either party has acted in bad faith, both parties may simply be victims of circumstance. This remedy cannot be forced upon a party as renegotiation must be mutually accepted.⁷⁵ If renegotiation fails, the court must then adapt the contract without the consent of parties.⁷⁶ This action can potentially erode party autonomy in international sales law.

VI CONCLUSION

The consequences of the case have sparked criticism surrounding article 79's broad interpretation and reference to domestic trends. Such consequences of the case may be argued to affect the interpretations of article 79 and pave a road to non-uniform application in future cases. However, the case does not present a binding precedent to be strictly followed by succeeding court cases.⁷⁷ The non-uniform consequences of the case may

⁷¹ Belgium 19 June 2009 Court of Cassation [Decision of the Supreme Court] (*Scafom International BV v Lorraine Tubes S.A.S.*) available at <<http://cisgw3.law.pace.edu/cases/090619b1.html>>.

⁷² Above n 23, 45.

⁷³ Above n 15, comment 40.

⁷⁴ Above n 70, 151.

Art 1.7 (good faith and faith dealing) UNIDROIT Principles 2004.

⁷⁵ Above n 34, 723.

⁷⁶ Harry Flechtner, 'Issues Relating to Exemption ("Force Majeure") under Article 79 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")', (2008) *Legal Studies Research Paper Series Working Paper No. 208-08*, 7-9.

⁷⁷ Above n 21, 36.

not be severe if courts refuse to acknowledge the decisions of the Court of Cassation. The existence of non-uniform problems in article 79 does not originate from *Scafom International BV*, but from the interpretation of article 79 itself. As such, *Scafom International BV* is the first case to publicly represent the reality of this issue.

In view of the black letter of the law and the interpretation of article 79, the Court of Cassation abided by a ruling that was completely inconsistent with the intention of the CISG. The inclusion of hardship contradicts the drafting purpose of the CISG and cannot be applied on the mere basis of convenience. If market fluctuations were expanded as an impediment depending on the severity of price and causation, the facts of the case still do not present convincing arguments to apply article 79. In the context of 2004, we would reasonably expect a steel trader to draft a renegotiation clause during the period of Chinese growth. In addition, the court's determination of a gap correlates with the forced inclusion of a domestic civil law provision of hardship which is reflected in article 6.2.2 of the UNIDROIT Principles, implying an unconscious effort towards a home-ward trend. In light of the unexpected price increase, the obligation to perform presents such an uneconomic position which may discourage international trade and disturb the purpose of the law to provide a safeguard within the sphere of international business. Therefore, to rebalance the dismantled contractual equilibrium rests on the conduct of the courts to provide a platform for fairness. The remaining conclusion is that the honourable intention behind the decision is not reflected in the insufficient legal reasoning of the Court of Cassation.